

E-Filed 1/22/09

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

HOWARD HERSHIPS,

Plaintiff,

v.

THE SUPERIOR COURT OF SANTA CLARA
COUNTY, et al.,

Defendants.

Case Number C 06-6644 JF (RS)

**ORDER¹ REQUESTING
SUPPLEMENTAL BRIEFING AND
CONTINUING HEARING DATE**

RE: Docket Nos. 85, 90, 91

In this § 1983 action, Plaintiff Howard Hershships (“Plaintiff”) alleges that Steven T. Kirsch (“Kirsch”), a wealthy philanthropist, conspired with four Santa Clara County Deputy District Attorneys (collectively, “Defendants”) to violate his civil rights. On October 25, 2005, Kirsch filed an action against Plaintiff in the small claims division of the Santa Clara Superior Court, alleging that Plaintiff intentionally scratched his automobile. On November 1, 2005, a criminal action based on the same alleged conduct was filed against Plaintiff in the Santa Clara Superior Court. Plaintiff alleges that the

¹ This disposition is not designated for publication in the official reports.

1 criminal action was the result of a conspiracy initiated by Kirsch and designed to impair Plaintiff's ability
2 to defend himself in the small claims action. Plaintiff seeks monetary damages for Kirsch's alleged role
3 in initiating the purportedly baseless criminal action and soliciting false accusations against him in
4 connection with that action.

5 Kirsch has moved to dismiss the claims against him pursuant to Federal Rule of Civil Procedure
6 12(b)(6) and 28 U.S.C. § 1915(e)(2)(B), which governs actions instituted by a party proceeding *in*
7 *forma pauperis*. However, due to a stay imposed on August 16, 2007 pending conclusion of the
8 criminal action, Kirsch's motions have not yet been heard. On December 17, 2008, the jury in the
9 criminal action returned a guilty verdict, which Plaintiff has appealed.

10 Based on a review of the complaint, it appears that resolving the issues raised by Plaintiff's
11 claims would require the Court to determine whether the charges giving rise to the state criminal
12 proceeding were filed as part of an improper conspiracy or with an improper motive, and whether
13 Kirsch solicited false testimony from witnesses in connection with the criminal proceeding. In that
14 instance, it is at least possible that this action is subject to dismissal under the rule of *Heck v.*
15 *Humphrey*, 512 U.S. 477, 486-87 (1994), which bars civil rights actions in which a judgment for the
16 plaintiff necessarily would impugn the validity of a criminal conviction that has not been reversed on
17 appeal or otherwise called into question. *See also Trice v. Modesto City Police Dep't*, No.
18 1:08-cv-01891-AWI, 2009 WL 102712 (E.D. Cal. Jan. 14, 2009) (holding that claim of fraudulent or
19 fabricated evidence, prosecutorial misconduct, or violations of plaintiff's right to counsel are barred by
20 *Heck*); *Harris v. State of California*, Civ. No. 07-1406 BTM, 2008 WL 595880, at *2-4 (S.D. Cal.
21 March 3, 2008) (holding that allegations of prosecutorial misconduct, "clear misconduct" by the judge,
22 and other "grave unfairness" in criminal proceedings were barred by *Heck*).

23 The parties have not addressed whether *Heck* is relevant in this case. The Court will direct each
24 party to do so in a supplemental brief not longer than five pages, to be filed not later than January 30,
25 2009. The hearing on Kirsch's motions to dismiss currently scheduled for January 23, 2009 will be
26 continued to February 6, 2009 at 9:00 AM.

1 **IT IS SO ORDERED.**

2 DATED: 1/22/09

3 
4 JEREMY FOGEL
5 United States District Judge
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1 This Order has been served upon the following persons:

2 Donald Alan Larkin Donald.Larkin@cityofpaloalto.org, Janet.Billups@cityofpaloalto.org

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6 5:06-cv-6644 Notice has been delivered by other means to:

7 Howard Hershops
8 P.O. Box 190711
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